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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
 )  
AT&T Corporation and ) CS Docket No. 98-178  
Tele-Communications, Inc. )  
 )

**JOINT COMMENTS AND REQUEST FOR IMPOSITION OF CONDITIONS**

**THE WIRELESS COMMUNICATIONS  
ASSOCIATION INTERNATIONAL, INC.**

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## EXECUTIVE SUMMARY

The Wireless Communications Association International, Inc. ("WCA") and the Independent Cable and Telecommunications Association ("ICTA") have an immediate and substantial interest in the Commission's disposition of the various license transfer applications filed to effectuate the proposed merger between AT&T Corporation ("AT&T") and Telecommunications, Inc. ("TCI"). The proposed structure of the merger raises significant questions as to whether wireless cable operators, private cable operators, other alternative multichannel video programming distributors ("MVPDs") and their subscribers will be given full and fair access to cable networks owned by Liberty Media Corp. ("Liberty") upon consummation of the merger and the associated restructuring of the combined company. The Commission's resolution of those questions will bear directly on the prospects for alternative MVPDs to emerge as a competitive alternative to TCI and other cable MSOs in local markets.

In particular, it is imperative that the Commission scrutinize the program access implications of AT&T's proposal to hold TCI's cable systems and Liberty in separate subsidiaries, each with its own "tracking stock." AT&T/TCI's emphasis on the post-merger "operational independence" of Liberty suggests that the companies are attempting to lay the groundwork for an argument that the tracking stock mechanism will have the effect of divesting AT&T of any ownership and control of Liberty, and that Liberty therefore will fall outside the scope of the program access rules once the merger is consummated. Commission precedent and the Cable Television Consumer Protection and Competition Act of 1992, however, reflect that Liberty is a "vertically integrated" programmer notwithstanding its status as a tracking stock subsidiary. WCA and ICTA thus ask the Commission to reaffirm that legal principle here and ensure that AT&T cannot use the tracking stock device to deny Liberty programming to cable's competitors.

Finally, the integration of AT&T's nationwide fiber-optic network with TCI's cable systems and potentially those of other MSOs in local markets raises the possibility that Liberty will attempt to circumvent the program access law by migrating its programming from satellite delivery to terrestrial delivery over the AT&T landline network. The Commission has long been aware of the anticompetitive consequences of satellite-to-terrestrial migration, and indeed has acknowledged that terrestrial distribution of programming "could eventually have a substantial impact on the ability of alternative MVPDs to compete in the video marketplace." That is precisely the case here, given the sheer breadth of the AT&T network and the fact that cable MSOs are *already* using terrestrial delivery to avoid selling their affiliated programming to cable's competitors. Accordingly, consistent with the Commission's well-established authority to impose conditions on license transfers where necessary to preserve the public interest, WCA and ICTA urge that the Commission condition any approval of the AT&T/TCI merger on an explicit and enforceable commitment from both entities that any current or future Liberty programming migrated from satellite to terrestrial delivery will continue to be available to alternative MVPDs on nondiscriminatory terms and conditions.

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**JOINT COMMENTS AND REQUEST FOR IMPOSITION OF CONDITIONS**

The Wireless Communications Association International, Inc. ("WCA")<sup>1/</sup> and the Independent Cable and Telecommunications Association ("ICTA")<sup>2/</sup> hereby submit their comments with respect to the various license transfer applications submitted in connection with the proposed merger between AT&T Corporation ("AT&T") and Tele-Communications, Inc. ("TCI"), and, for the reasons set forth below, request the imposition of conditions on any Commission authorization permitting the merger to be consummated.

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<sup>1/</sup> WCA, formerly known as The Wireless Cable Association International, Inc., is the principal trade association of the fixed wireless broadband industry. Its membership includes virtually every terrestrial wireless video provider in the United States; the licensees of many of the Multipoint Distribution Service ("MDS") stations and Instructional Television Fixed Service ("ITFS") stations that lease transmission capacity to wireless cable operators; Local Multipoint Distribution Service ("LMDS") licensees; producers of video programming; and manufacturers of wireless broadband transmission and reception equipment.

<sup>2/</sup> ICTA is a trade and service association comprised largely of private cable and telephony operators, property owners and managers, and vendors of cable and telephone equipment. Private cable and telephony operators primarily serve multiple dwelling units (MDUs"), including apartments, condominiums, cooperatives, planned unit developments, college campuses and hotels/motels.

## I. INTRODUCTION.

As the Commission considers the program access implications of the proposed merger between AT&T and TCI, it should take guidance from the blueprint it developed when it last considered a merger involving TCI and its cable programming subsidiary, Liberty Media Corp. (“Liberty”):

[E]ffective review at the initial stage of the transaction (*i.e.*, the license transfer) provides a prophylactic mechanism by which the Commission can anticipate and address the potential anticompetitive effects resulting from a proposed merger beforehand, rather than await the filing of individual complaints. In addition, early identification of potential anticompetitive harm will also serve to mitigate the proliferation of complaints under the Commission’s rules. Finally, there may be anticompetitive effects flowing from a merger which may not be addressed or remedied by the Commission’s rules.<sup>3/</sup>

Each of these elements is present in this case. Insofar as program access is concerned, the “potential anticompetitive effects” of the proposed merger are twofold. First, by placing particular emphasis on the proposed “separation” of Liberty Media Corp. (“Liberty”) from TCI’s cable assets via the use of “tracking stock,” AT&T and TCI appear to be laying the foundation for an argument that after the merger Liberty will no longer be “owned” by a “cable operator” as required under 47 C.F.R. § 76.1000(b), and that Liberty therefore will fall entirely outside the scope of the Commission’s program access rules. Second, the integration of AT&T’s nationwide fiber-optic network with TCI’s cable systems and potentially those of other cable MSOs in local markets raises the possibility that, as cable’s competitors have feared for some

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<sup>3/</sup> *Tele-Communications, Inc. and Liberty Media Corporation*, 9 FCC Rcd 4783, 4786-7 (CSB, 1994) (“*TCI-Liberty*”).

time, Liberty will seek to avoid its program access obligations by migrating its affiliated programming from satellite delivery to terrestrial delivery utilizing the AT&T landline network.

As discussed in greater detail herein, the circumstances surrounding the AT&T/TCI merger require “prophylactic” Commission action that will reaffirm Liberty’s program access obligations to TCI’s competitors and preempt exactly the sort of piecemeal program access litigation that the Commission presumably wants to *avoid* in this proceeding. Furthermore, a proactive Commission ruling on these issues during the license transfer process will foreclose AT&T and TCI from attempting to take cover behind technical loopholes in the Commission’s program access rules (*e.g.*, satellite-to-terrestrial migration), thereby ensuring that any Commission approval of the merger will be faithful to the pro-competitive objectives of the program access provisions of the Cable Consumer Protection and Competition Act of 1992 (the “1992 Cable Act”).<sup>4/</sup> Therefore, for the reasons discussed below, WCA and ICTA request that the Commission (1) reaffirm that Liberty will continue to be covered by the program access rules notwithstanding AT&T’s proposal to hold TCI’s cable systems and Liberty in separate tracking stock subsidiaries; and (2) condition any approval of the AT&T/TCI license transfer applications on an explicit, enforceable commitment from both entities that any current or future Liberty

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<sup>4/</sup> See 1992 Cable Act Conference Report, H.R. Rep. 102-862, 102d Cong., 2d Sess. at 93 (1992) (“In adopting rules under this section, the Conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory rates to non-cable technologies. The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies by providing facilities-based competition to cable and extending programming to areas not served by cable.”).

programming migrated from satellite to terrestrial delivery will continue to be available to alternative MVPDs on nondiscriminatory terms and conditions.

## II. DISCUSSION.

### A. *The Proposed Structure of the AT&T/TCI Merger Has Unique and Substantial Program Access Implications.*

The nexus between the AT&T/TCI merger and the critical issue of program access lies in the basic structure of the transaction itself. As described in the various AT&T/TCI license transfer applications, TCI and its various subsidiaries, including Liberty, will merge into a subsidiary of AT&T.<sup>5/</sup> The assets and businesses of each company will be attributed to either of two groups: the Liberty Media Group or the Common Stock Group.<sup>6/</sup> The Liberty Media Group will continue to hold TCI's cable programming assets, plus TCI's minority interest in Sprint's PCS ventures.<sup>7/</sup> The Common Stock Group will be subdivided into a third group, AT&T Consumer Services Company ("AT&T Consumer Services Co."), which will hold, *inter alia*, TCI's cable television systems.<sup>8/</sup>

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<sup>5/</sup> See, e.g., Tele-Communications, Inc., Transferor, and AT&T Corp., Transferee, Application for Authority for Transfer of Control of Authorizations to Provide International Resold Communications Services, FCC File No. ITC-T/C-1998-0914-00635, at 11 (filed Sept. 14, 1998) (the "AT&T/TCI Submission"). Liberty holds ownership interests in a large number of popular cable programming services, including those held by Discovery Communications, Inc., USA Networks; BET Holdings, Inc.; Fox/Liberty Networks, LLC (encompassing 21 regional sports networks); QVC, Inc.; MacNeil/Lehrer Productions and Encore Media Group. See *id.* at 9.

<sup>6/</sup> *Id.* at 11-12.

<sup>7/</sup> *Id.* at 12.

<sup>8/</sup> *Id.* AT&T Consumer Services Co. also will include the merged company's local residential telephone, domestic long-distance residential telephone, international residential telephone and residential Internet businesses, along with AT&T's consumer residential wireless mobile  
(continued...)

For the purported purpose of permitting investors to place targeted bets on the different lines of businesses held by the merged company, *but without surrendering ownership and control of any of TCI's cable or programming assets*, AT&T will create separate tracking stocks for the Liberty Media Group and the AT&T Consumer Services Co. Group.<sup>9/</sup> As reflected in documents recently filed by TCI with the Securities and Exchange Commission, the holders of AT&T Liberty Class A Tracking Stock and the holders of shares of AT&T Liberty Class B tracking stock will be entitled to vote on all matters presented to AT&T's shareholders, with the Liberty Class A shareholders entitled to one-tenth (1/10) of a vote per share and the Liberty Class B shareholders entitled to one full vote per share.<sup>10/</sup> AT&T's use of the tracking stock device is distinguishable from a full spinoff, under which the parent and subsidiary(ies) are split into separate companies controlled and managed by separate entities, with the shareholders of the subsidiary accorded full voting rights *vis-a-vis* the subsidiary's affairs. By contrast, under a tracking stock arrangement, the subsidiary remains under the control of the parent, with the owners of the subsidiary's tracking stock holding less than full voting rights in the parent, and none in the subsidiary.<sup>11/</sup>

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<sup>8/</sup> (...continued)

communications business. *Id.* The Common Stock Group will include the remainder of AT&T's current network and business services, but will not have its own tracking stock. *Id.*

<sup>9/</sup> *Id.* at 12 n.20.

<sup>10/</sup> See TCI Communications, Inc., Form 10-Q for quarter ended June 30, 1998, at 9 (filed Aug. 14, 1998) (the "TCI Communications 10-Q").

<sup>11/</sup> See, e.g., Jaffe, "How the AT&T Deal Shakes Out," *The Boston Globe*, at A8 (July 8, 1998); Hamilton, "Are These Stocks On The Right Track?", *Los Angeles Times*, at D5 (Dec. 9, 1997) (discussing differences between "tracking stocks" and spinoffs).



The core of AT&T/TCI's public interest showing in support of the above-described transaction is their assertion that "the proposed Merger will expand and accelerate AT&T's ability to compete with ILECs in providing local telephone service to residential customers."<sup>12/</sup> Thus it is striking that AT&T/TCI emphasize the alleged post-merger "operational independence" of Liberty Media Group, an issue which ostensibly has nothing to do with the putative public interest benefits of AT&T's entry into the local loop. For instance, in addition to highlighting the separate tracking stocks for each Group,<sup>13/</sup> AT&T/TCI allege that there will be a "firewall" between Liberty Media Group and AT&T Consumer Services Co., and that Liberty Media Group will be preserved "as a separately managed business group engaged in its current video programming businesses and any other business it elects to enter."<sup>14/</sup>

In point of fact, however, the relationship between Liberty Media Group's cable programming services and the TCI cable systems held by AT&T Consumer Services Co. will be far closer than AT&T/TCI have led the Commission to believe. Indeed, AT&T/TCI's claims as to Liberty's alleged "operational independence" after the merger were recently laid to rest by TCI/Liberty's Chairman and CEO, Dr. John Malone:

When you sell, you take cash and you go away. This ain't a sale. I mean, I'm going to be probably [AT&T's] largest shareholder. *We are going to be all intertwined with each other.* I'm going to be on the board of their company, on the board of AT&T Consumer Services, and the chairman of the Liberty Company, *all interrelated through this common board of directors and this*

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<sup>12/</sup> AT&T/TCI Submission at 15.

<sup>13/</sup> *Id.* at 12 n.19 & n.20.

<sup>14/</sup> *Id.* at 14.

*common balance sheet.* So it's anything but a sale from my point of view.<sup>15/</sup>

Other circumstances surrounding the merger similarly indicate that the close relationship between TCI's cable systems and Liberty will continue in full force if and when the merger is consummated. Here some historical perspective is required. The Commission has found that TCI's management created Liberty in 1991 as an "independent" entity to "avoid or reduce the likelihood of future forced divestiture of assets" required by pending federal legislation, specifically the 1992 Cable Act.<sup>16/</sup> TCI thus assigned to Liberty most of TCI's cable programming interests and some of TCI's interests in certain cable television operating companies.<sup>17/</sup> In reviewing the license transfer applications associated with the 1994 merger of TCI and Liberty back into a single corporation, TCI/Liberty Holding Company, the Commission found that TCI and Liberty "have closely cooperated in the pursuit of common business strategies,"<sup>18/</sup> maintained "a number of close commercial and financial arrangements,"<sup>19/</sup> and

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<sup>15/</sup> Higgins & Colman, "John Malone Explains It All," *Broadcasting & Cable*, at 26 (July 13, 1998) (emphasis added). See also AT&T/TCI Submission at 13-14 (noting that Mr. Malone will serve as Chairman of Liberty Media Group, and will hold seats on the AT&T Board of Directors and AT&T's Capital Stock Committee).

<sup>16/</sup> *TCI-Liberty*, 9 FCC Rcd at 4784.

<sup>17/</sup> *Id.*

<sup>18/</sup> *Id.* at 4787.

<sup>19/</sup> *Id.* at 4788.

generally “have operated more like corporate affiliates and only as separate independent corporations to a limited extent.”<sup>20/</sup>

In 1995, TCI’s management created separate tracking stocks for Liberty as a means of “help[ing] the financial markets analyze [TCI’s] programming assets and their underlying performance and valuation.”<sup>21/</sup> The rationale for TCI’s creation of the Liberty Media Group tracking stock was further described by a TCI senior officer as follows:

This new equity restructuring gives [TCI’s] Domestic Communications Group its own platform and focuses investors more on our core business and prospects. *I look forward to the many opportunities that our distribution business will benefit from while working in concert with Liberty Media Group.*<sup>22/</sup>

Similarly, Dr. Malone pointed out that the tracking stock arrangement would preserve the operational synergies between Liberty and TCI’s cable operations: “This [tracking stock] plan will give TCI investors and the company itself enormous financial flexibility, tax efficiencies and new capabilities. [I]nvestors could target one or more of our lines of business *while still relying on the synergies and scale of economics of the TCI parent.*”<sup>23/</sup> More recently, Dr. Malone echoed

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<sup>20/</sup> *Id.*

<sup>21/</sup> “Tele-communications, Inc. Shareholders Approve Liberty Media Group Stock Proposals,” TCI Press Release (August 3, 1995) (<http://www.tci.com/tci.com/press/lb080395.html>). Pursuant to the plan approved by TCI’s Board of Directors, one-fourth of one share of Series A Liberty Media Group Common Stock was to be distributed to holders of outstanding shares of TCI’s Class A Common Stock as of August 4, 1995; one-fourth of one share of Series B Liberty Media Group Common Stock was to be distributed to holders of outstanding shares of TCI’s Class B Common Stock as of that same date. *Id.*

<sup>22/</sup> *Id.* (quoting TCI Communications, Inc.’s President and CEO at that time, Brendan Clouston) (emphasis added).

<sup>23/</sup> Flint, “TCI Restructures,” *Daily Variety*, at 4 (November 18, 1994) (emphasis added).

these very same sentiments in commenting on the proposed AT&T/TCI merger, stating that “we can expect a strong and favorable continuation of the synergies between the two groups that have created so much Liberty value in the past.”<sup>24/</sup>

WCA and ICTA therefore submit that the chasm between Liberty’s alleged “operational independence” and what will actually be the case raises the following issues as to the merger’s impact on program access:

- First, since the applicability of the Commission’s program access rules to the Liberty cable networks depends upon whether Liberty is “owned” by a “cable operator,” AT&T/TCI’s emphasis on the supposed “separation” of Liberty from TCI’s cable systems suggests that AT&T/TCI are laying the groundwork for an argument that, post-merger, Liberty will no longer be owned by a cable operator and thus should not be subject to program access requirements.
- Second, since in reality Liberty’s close relationship with the TCI cable systems will continue to be preserved and engineered by Dr. Malone, and since Dr. Malone’s incentives to discriminate against cable’s competitors for the benefit of TCI’s cable systems will therefore remain unchanged after the merger, the integration of AT&T’s nationwide fiber-optic network with TCI’s cable systems and potentially those of other cable MSOs in local markets will provide Liberty with an unparalleled opportunity to evade its program access obligations by migrating its programming from satellite delivery to terrestrial delivery via the AT&T landline network.

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<sup>24/</sup> Gibbons, “Malone’s Liberty is Cash-Rich,” *Multichannel News*, at 5 (June 29, 1998). In that vein, TCI recently advised the SEC that “[c]ertain agreements to be entered into at the time of the Merger as contemplated by the Merger Agreement will, among other things, provide preferred vendor status to [Liberty] for digital basic distribution on AT&T’s systems of new programming services created by [Liberty] and its affiliates, provide for a renewal of existing affiliation agreements and provide for the business of [Liberty] to continue to be managed following the Merger by certain members of TCI’s management who currently manage the businesses of Liberty Media Group . . . .” TCI Communications 10-Q at 10.

As discussed below, neither of these potential harms can be reconciled with the pro-competitive objectives of the 1992 Cable Act. Thus it is imperative that the Commission take the proactive steps recommended herein to ensure that the AT&T/TCI merger does not cause irreparable injury to alternative MVPDs and their subscribers.

*B. The Commission Should Reaffirm That Liberty Will Continue To Be Covered By The Program Access Rules Notwithstanding AT&T's Proposal to Hold TCI's Cable Systems and Liberty in Separate Tracking Stock Subsidiaries.*

There is little question that where a cable operator holds satellite-delivered cable networks in a tracking stock subsidiary, those networks are covered by the Commission's program access rules. Very recently, for example, the Commission confirmed that the FX cable network is covered by the program access rules by virtue of Liberty's 50% ownership thereof, notwithstanding Liberty's status as a tracking stock subsidiary of TCI.<sup>25/</sup> That result is entirely logical in view of the fact that tracking stock is merely designed to provide the parent company's stockholders with an opportunity to purchase securities that are more closely tied to the financial performance of the tracking stock subsidiary. As discussed above, the use of tracking stock does not affect the parent company's underlying *ownership or control* of the tracking stock subsidiary.<sup>26/</sup> Indeed TCI's own statement regarding its creation of tracking stock for its

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<sup>25/</sup> *Echostar Communications Corporation v. Fox/Liberty Networks, LLC, et al.*, 13 FCC Rcd 7394, 7397 (CSB, 1998); *see also Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034, 1123-4 (1998) (noting that proposed transaction to bring the Seagram cable networks under the control of HSN, Inc. would apparently result in both the USA Network and the SCI-FI Network being considered vertically integrated, by virtue of Liberty's proposed ownership interest in HSN, Inc.) (the "Fourth Annual Report").

<sup>26/</sup> Tele-Communications, Inc. Announces Plan to Create Two New Series of Stock," TCI Press Release (Dec. 19, 1996) (<http://www.tci.com/tci.com/press/121996.html>) (emphasis added).

Telephony Group is instructive on this point: “The proposed target stock structure was chosen because it *preserves the advantages of continued ownership by TCI of its telephony and cable businesses* and the benefits of being part of a consolidated enterprise, including avoiding costs associated with operating separate public corporations.

Moreover, both the text and legislative history of the 1992 Cable Act reflect that common ownership of cable systems and satellite-delivered cable networks (whether achieved through a tracking stock device or otherwise) is the touchstone for determining whether such networks are “owned” by a cable operator and thus are subject to the Commission’s program access rules. Congress specifically recognized that the program access problem often arises from common ownership of cable systems and cable programming services, which would include a situation where a non-cable entity (in this case AT&T) holds simultaneous ownership interest in a cable operator (AT&T Consumer Services Group) and satellite-delivered cable networks (Liberty).<sup>27/</sup> Similarly, in its 1993 *Report and Order* implementing Section 628 of the Act, the Commission indicated that the statute’s program access provisions were directed toward anticompetitive conduct arising from “combined ownership of cable systems and suppliers of cable programming.”<sup>28/</sup>

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<sup>27/</sup> See 1992 Cable Act, § 2(a)(5) (“The cable industry has become vertically integrated; cable operators and cable programmers often have *common ownership*.”) [emphasis added]; H.R. Rep. No. 102-628, 102d Cong., 2d Sess., at 41 (1992) [“In the cable industry, vertical integration generally refers to *common ownership* of cable systems and program networks, channels, services, or program production companies.”] [emphasis added]; *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 - Horizontal and Vertical Ownership Limits*, 8 FCC Rcd 8565, 8583 (1993) [in the context of the FCC’s channel occupancy rules, vertical integration refers to “*common ownership* of both programming and distribution systems”].

<sup>28/</sup> *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and*  
(continued...)

Finally, the Commission must remain cognizant of the fact that this issue is equally relevant to other vertically-integrated cable programmers, and that any failure by the Commission to reaffirm Liberty's program access obligations as requested herein could jeopardize the ability of cable's competitors and their subscribers to obtain access to the lion's share of the most popular cable programming services available in the marketplace today. For example, Time Warner currently holds its cable systems and the Turner satellite-delivered cable networks in separate "first-tier" subsidiaries, *i.e.*, Time Warner Entertainment ("TWE") and Turner Broadcasting, respectively.<sup>29/</sup> Thus far, however, Time Warner has never seriously argued that the Turner cable networks are exempt from the program access rules simply because Section 76.1000(b) does not explicitly state that Time Warner's 100% ownership of TWE's cable systems is attributable. The Commission will invite Time Warner and other similarly situated cable programmers to rethink that position if it allows an otherwise vertically-integrated programmer to escape its program access obligations via the use of a tracking stock device.

In sum, absent an explicit Commission ruling to the contrary, the proposed structure of the AT&T/TCI merger threatens to produce the very result Congress intended to avoid when it applied Section 628's program access restrictions to entities that hold simultaneous ownership interests in cable operators and satellite-delivered cable networks. As recently noted by the Commission:

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<sup>28/</sup> (...continued)

*Competition Act of 1992 - Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, 3365-6 (1993) (the "Program Access Report & Order").

<sup>29/</sup> *See Turner Broadcasting System, Inc.*, 11 FCC Rcd 19565, 19597-8 (1996).

The program access provisions of the 1992 Cable Act were enacted to increase competition and diversity in the multichannel video programming distribution market by providing greater access to cable programming services. . . Congress found that the cable industry was significantly vertically integrated, *i.e.*, cable systems and programmers are often commonly owned, and vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other multichannel programming distributors.<sup>30/</sup>

This statement applies to TCI and Liberty now, and it will apply with the same force (if not more so) to AT&T Consumer Services Co. Group and Liberty Media Group after the AT&T/TCI merger. Accordingly, there simply is no public interest rationale for the Commission to issue a ruling that even suggests that Liberty will no longer be covered by the program access rules after the merger. WCA and ICTA thus urge the Commission to exercise its broad discretion to act in the public interest and reaffirm Liberty's program access obligations notwithstanding AT&T's intent to hold TCI's cable systems and Liberty in separate tracking stock subsidiaries.

*C. The Commission Should Condition Any Approval of the AT&T/TCI License Transfer Applications on a Commitment From Both Entities That Any Liberty Programming Migrated from Satellite to Terrestrial Delivery Will Continue to be Available to Wireless Cable Operators and Other Alternative MVPDs on Nondiscriminatory Terms and Conditions.*

The Commission has acknowledged that cognizable program access claims may arise from "conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing

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<sup>30/</sup> *Outdoor Life Network and Speedvision Network*, DA 98-1241, at ¶ 10 (CSB, rel. June 26, 1998).



MVPDs.”<sup>31/</sup> More recently, the Commission has reaffirmed that “the issue of terrestrial distribution of programming could eventually have substantial impact on the ability of alternative MVPDs to compete in the video marketplace.”<sup>32/</sup> As demonstrated below, that finding bears directly on the Commission’s public interest review of the AT&T/TCI license transfer applications, and militates strongly in favor of preemptive Commission action that will eliminate the enormous risk of satellite-to-terrestrial migration posed by the AT&T/TCI merger.

AT&T is one of only four domestic long-distance carriers that currently possesses a coast-to-coast fiber optic network.<sup>33/</sup> As described in the various AT&T/TCI license transfer applications, AT&T’s entry into the market for local residential telephone service will be achieved by integrating AT&T’s network facilities with those of TCI’s cable systems.<sup>34/</sup> AT&T’s ultimate plan calls for the development of an “end-to-end packet network” that will provide

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<sup>31/</sup> *Implementation of Section 302 of the Telecommunications Act of 1996 — Open Video Systems, Second Report and Order*, 11 FCC Rcd 18223, 18325 n.451 (1996).

<sup>32/</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, CS Docket No. 97-248, at ¶ 71 (rel. Aug. 10, 1998) (the “*Program Access MO&O*”).

<sup>33/</sup> *Teleport Communications Group, Inc.*, CC Docket No. 98-24, FCC 98-169, at ¶ 28 (rel. July 23, 1998).

<sup>34/</sup> *See, e.g.*, AT&T/TCI Submission at 21 (“AT&T and TCI anticipate combining their assets to invest in and develop advanced wireline facilities that will compete directly with ILECS to provide toll-quality voice and high-speed data communications to America’s homes. TCI contributes its residential wireline network and architecture that currently serves approximately 12.7 million homes through cable systems controlled by TCI. AT&T contributes its experience in providing toll-quality voice and data traffic, switching technology, a brand name that can compete with incumbent local telephone companies and capital to cover the significant costs of the upgrade of TCI’s facilities to provide for two-way voice telephony.”)

“long distance, video, local, wireless, Internet and other data services on a packaged, as well as individualized, basis.”<sup>35/</sup>

AT&T acknowledges that although TCI is the largest cable operator in the United States, its cable plant does not provide the nationwide “footprint” necessary for AT&T to provide “all distance service” to all areas of the United States.<sup>36/</sup> Thus it has been reported that AT&T has been actively soliciting similar telephony joint ventures with other cable MSOs to fill in those areas not currently served by TCI’s cable systems.<sup>37/</sup> Moreover, AT&T’s solicitation of TCI and other cable MSOs for its nationwide phone network comes at a time when the cable MSOs themselves are developing their own regional networks via “clustering” of adjacent cable systems in local markets.<sup>38/</sup> According to the Commission’s most recent Annual Report to Congress on the Status of Competition in the Market for Delivery of Video Programming:

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<sup>35/</sup> *Id.* at 39, 42.

<sup>36/</sup> *See id.* at 44 n.71.

<sup>37/</sup> *See, e.g.,* Gibbons, “AT&T Telephony Affiliates Loom,” *Multichannel News*, at 1 (Oct. 19, 1998) (“Some Wall Street analysts and cable executives believe that AT&T and TCI want to trot out -- possibly at the Western Cable show in Anaheim, California in December -- a number of telephony affiliates, both from within TCI’s existing affiliate circle and from outside of that camp. . . One hopeful lineup, an analyst said, would include Bresnan and Lenfest Communications Corp., which is 50 percent-owned by TCI, along with Time Warner and Comcast Corp. Collectively, those four MSOs pass more than 28 million homes, while TCI reaches an estimated 18 million.”).

<sup>38/</sup> As noted in the Commission’s response to a recent written inquiry from Rep. Billy Tauzin about program access, “clustering” facilitates linkage of cable systems via fiber optic connections. *See* Letter from William E. Kennard to Rep. W.J. (Billy) Tauzin, Chairman, Subcommittee on Telecommunications, Trade and Consumer Protection, U.S. House of Representatives, Responses to Questions at 6 (Jan. 23, 1998).

- Nearly 53% of all cable subscribers are served by “clusters” of commonly owned, contiguous cable systems.<sup>39/</sup> Between 1995 and 1996, the number of clusters with 300,000 to 399,000 subscribers increased by 38% and the number of clusters with at least 500,000 subscribers increased by 20%.<sup>40/</sup>
- The four largest MSOs now serve 54.3% of all cable subscribers nationwide - Tele-Communications, Inc. (“TCI”) (25.4%), Time Warner (16.0%), MediaOne (7.0%) and Comcast (5.8%).<sup>41/</sup> These MSOs controlled 84 of the 139 cable system “clusters” serving at least 100,000 subscribers at the end of 1996.<sup>42/</sup> In addition, these MSOs still hold ownership interests in many of the most popular basic and premium cable networks available today.<sup>43/</sup>
- TCI, Time Warner and other large MSOs have announced additional “clustering” transactions which will widen their already substantial control over local markets.<sup>44/</sup> TCI has also proposed to form partnerships with other MSOs in order to restructure its systems into regional clusters.<sup>45/</sup> The net effect of these transactions will be that the top four largest MSOs

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<sup>39/</sup> *Fourth Annual Report*, 13 FCC Rcd at 1116.

<sup>40/</sup> *Id.*

<sup>41/</sup> *Id.* at 1119, 1205 (Table E-5).

<sup>42/</sup> *Id.* at 1116.

<sup>43/</sup> *Id.* at 1226 (Table F-5).

<sup>44/</sup> *Id.* at 1117. For instance, TCI recently sold 10 cable systems serving 820,000 subscribers in the New York ADI to Cablevision Systems Corp. (“Cablevision”) in exchange for a one-third interest in that company. *Id.*; see also Comments of Cablevision Systems Corporation, CS Docket No. 98-82 and MM Docket No. 92-264, at 12 (filed Aug. 14, 1998). Because Cablevision already owns systems serving 1.7 million subscribers in the New York market, its acquisition of the TCI systems enables it to strengthen its existing cluster of systems in and around New York City. *Id.* TCI has announced similar transactions with Falcon Cable and Adelphia Communications, the latter of which will create a major cluster in Pennsylvania, New York and Ohio serving 466,000 subscribers. *Fourth Annual Report*, 13 FCC Rcd at 1117.

<sup>45/</sup> *Id.* at 1118.

will enjoy unprecedented control over distribution of video programming in national, local *and* regional markets.<sup>46/</sup>

Against this backdrop, it becomes clear that the prospective linkage of AT&T's nationwide fiber-optic network with regional cable systems serving the majority of cable subscribers throughout the United States will provide Liberty with an unprecedented opportunity to avoid its program access obligations by migrating its programming from satellite to terrestrial delivery.

In its recent *Memorandum Opinion and Order* approving various reforms to its program access complaint procedures, the Commission declined to adopt detailed rules specifically prohibiting satellite-to-terrestrial migration of programming, citing insufficient record evidence as to the prevalence of the problem.<sup>47/</sup> The record in that proceeding, however, closed well before the announcement of the AT&T/TCI merger, and thus the Commission has yet to fully evaluate whether its program access rules are sufficient to eliminate the heightened risk of satellite-to-terrestrial migration posed by linkage of TCI's cable systems with AT&T's nationwide "backbone" network. Moreover, the fact that the Commission has yet to adopt across-the-board rules prohibiting satellite-to-terrestrial migration has no bearing on its well-established authority

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<sup>46/</sup> Not coincidentally, a substantial number of cable MSOs (including TCI) have asked the Commission to liberalize both its cable ownership attribution rules and its horizontal ownership "cap," so that the MSOs may continue to aggressively pursue their clustering strategies without running afoul of the Commission's horizontal ownership limitations for cable television system operators. *See, e.g.*, Comments of Cablevision Systems Corporation, CS Docket No. 98-82 and MM Docket No. 92-264, at 5-6 (filed Aug. 14, 1998); Comments of Tele-Communications, Inc., CS Docket No. 98-82, at 19-24 (filed Aug. 14, 1998); Comments of Adelphia Communications Corporation, *et al.*, CS Docket No. 98-82 and MM Docket No. 92-264, at 4-7 (filed Aug. 14, 1998); Comments of Time Warner Inc., CS Docket No. 98-82 and MM Docket No. 92-264, at 32-38 (filed August 14, 1998).

<sup>47/</sup> *Program Access MO&O* at ¶ 71.

to impose conditions on the AT&T/TCI merger,<sup>48/</sup> particularly in light of the fact that potential cable affiliates of AT&T are *already* using terrestrial delivery to avoid their program access obligations to cable's competitors.<sup>49/</sup>

Again, it must be emphasized here that the Commission's review of the program access implications of the AT&T/TCI merger should "anticipate and address the potential anticompetitive effects resulting from a proposed merger beforehand, rather than await the filing of individual complaints."<sup>50/</sup> Clearly, the Commission is not required to amend its rules or otherwise defer consideration of remedial action until competition has been obliterated by widespread abuses of the Commission's program access rules. Indeed, given the pro-competitive policies that are the foundation of the program access provisions of the 1992 Cable Act, it is impossible to argue that such a posture would serve the public interest in this case. Accordingly, WCA and ICTA request that the Commission act ahead of the curve in this matter and condition any approval of the AT&T/TCI license transfer applications on an explicit and enforceable commitment from both entities that any current or future Liberty programming migrated from

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<sup>48/</sup> See, e.g., *MCI Communications Corporation and British Telecommunications plc*, FCC 97-302, at ¶ 294 (rel. Aug. 21, 1997); *NYNEX Corporation and Bell Atlantic Corporation*, FCC 97-286, at ¶ 178 (rel. Aug. 14, 1997); *Craig O. McCaw*, 9 FCC Rcd 5837, 5873-5909 (1994).

<sup>49/</sup> For instance, if the AT&T/TCI merger is consummated, AT&T will inherit TCI's one-third interest in Cablevision Systems Corp., which is already avoiding its program access obligations by utilizing fiber to deliver its recently-launched local and regional cable networks to subscribers in its New York metropolitan area "cluster." See Umstead & Forkan, "Rainbow Keeps New Services Exclusive," *Multichannel News*, at 1 (July 6, 1998). In addition, Cablevision Chairman Charles Dolan has been quoted as telling colleagues that "he would like to restrict distribution of SportsChannel groups of services . . . to cable systems only." *Satellite Business News*, at 3 (Oct. 8, 1997).

<sup>50/</sup> *TCI-Liberty*, 9 FCC Rcd at 4786-7.

satellite to terrestrial delivery will continue to be available to alternative MVPDs on nondiscriminatory terms and conditions.<sup>51/</sup>

### **III. CONCLUSION.**

WCA and ICTA recognize that consumers benefit from vigorous competition in the marketplace, and thus WCA and ICTA does not unconditionally oppose transactions that facilitate competitive entry by new providers of local telecommunications services. The fact remains, however, that the Commission cannot and should not sacrifice competition to cable on the altar of promoting competition in the local loop. Given the high priority that the Commission has accorded to program access over the past year, it certainly would be anomalous for the Commission to now abandon that agenda solely to give AT&T easier entry into the local telephone business. WCA and ICTA thus submit that competition among MVPDs, and not just competition to the ILECs, must be a cornerstone of any public interest analysis of the AT&T/TCI merger, and that the Commission's pro-competitive agenda will be best served by taking preemptive measures which ensure that alternative MVPDs will not be placed at a further disadvantage when attempting to acquire Liberty programming. Accordingly, if the Commission

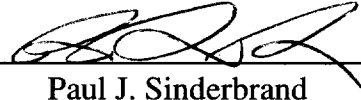
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<sup>51/</sup> For purposes of this condition, "Liberty programming" should be defined as that programming in which Liberty has an "attributable interest" as defined in Section 76.1000(b), *e.g.*, a 5% voting or nonvoting stock interest.

elects not to deny the AT&T/TCI license transfer applications, WCA and ICTA urge that any grant of those applications be subject to the safeguards recommended above.

Respectfully submitted,


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